

**United States Department of Labor  
Employees' Compensation Appeals Board**

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**B.T., Appellant**

**and**

**U.S. POSTAL SERVICE, POST OFFICE,  
Dillon, SC, Employer**

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**Docket No. 16-1820  
Issued: March 10, 2017**

*Appearances:*  
*Appellant, pro se*  
*Office of Solicitor, for the Director*

*Case Submitted on the Record*

**DECISION AND ORDER**

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge  
COLLEEN DUFFY KIKO, Judge  
VALERIE D. EVANS-HARRELL, Alternate Judge

**JURISDICTION**

On September 12, 2016 appellant filed a timely appeal from a March 29, 2016 merit decision and a May 16, 2016 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Pursuant to the Federal Employees' Compensation Act<sup>1</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of this case.

**ISSUES**

The issues are: (1) whether appellant has more than 63 percent permanent impairment of the right lower extremity; and (2) whether OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

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<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>2</sup> The facts and circumstances of the case as presented in the Board's prior decision are incorporated herein by reference. The relevant facts are as follows.

Appellant, who was then a 45-year-old letter carrier, filed a traumatic injury claim (Form CA-1) for a right knee injury sustained on February 6, 1993 when he fell from a porch while in the performance of his duties. OWCP accepted the claim, for right medial meniscus tear, closed fracture of right clavicle, and right knee osteoarthritis. He underwent a right knee arthroscopy to repair the torn meniscus in March 1993, had a total right knee replacement on August 1, 1995, a revision arthroplasty of the right knee on March 20, 2000, and additional revision right knee surgery on January 15, 2001.

On June 21, 1996 OWCP issued a schedule award for 37 percent right lower extremity permanent impairment. The period of the award was 106.56 weeks from February 4, 1996.

Appellant requested a hearing before an OWCP hearing representative. By decision dated July 3, 1997, the hearing representative set aside the June 21, 1996 decision, finding that further development of the medical evidence was required. The hearing representative noted that the attending physician, Dr. J. Lorin Mason, a Board-certified orthopedic surgeon, had opined that appellant had 50 percent right lower extremity permanent impairment.

By decision dated November 25, 1997, OWCP granted an additional 13 percent right lower extremity permanent impairment, for a combined schedule award total of 50 percent permanent impairment of the right leg.

In April 2002, appellant was receiving treatment for left knee problems. He received OWCP approved injections and on May 28, 2002 appellant's treating physician at that time, Dr. Nigel Watt, a Board-certified orthopedic surgeon, requested authorization for a total left knee replacement. By decision dated September 26, 2002, OWCP denied authorization for the proposed surgery. Appellant requested a hearing before an OWCP hearing representative and, by decision dated September 12, 2003, the hearing representative affirmed the September 26, 2002 decision. Appellant appealed that decision to the Board.

By decision dated May 26, 2004, the Board found that the evidence of record was insufficient to establish that the accepted February 6, 1993 employment injury caused or contributed to the need for a total left knee replacement.

On December 1, 2010 appellant submitted a request for an increased schedule award (Form CA-7) and included a November 18, 2010 report from Dr. Watt. Dr. Watt opined that appellant had 63 percent right lower extremity permanent impairment under the fifth edition of American Medical Association, *Guides to the Evaluation of Permanent Impairment*. OWCP referred Dr. Watt's report to an OWCP medical adviser. In a report dated December 22, 2010, OWCP's medical adviser opined that appellant had 63 percent right lower extremity permanent

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<sup>2</sup> Docket No. 04-0461 (issued May 26, 2004).

impairment under the sixth edition of the A.M.A., *Guides*, based on a poor result from total right knee replacement surgery.

By decision dated January 7, 2011, OWCP issued a schedule award for an additional 13 percent permanent impairment to the right lower extremity, for a combined total of 63 percent permanent impairment of the right lower extremity. The period of the award was 37.44 weeks from July 11, 2004 to March 30, 2005.

The record indicates that on March 20, 2013, Dr. Thomas Gross, a Board-certified orthopedic surgeon, performed a right knee revision arthroplasty, and complete synovectomy. On June 30, 2014 appellant requested an increased schedule award (Form CA-7) and authorization for additional right knee surgery. After review by an OWCP medical adviser, OWCP approved the right knee revision arthroplasty surgery which was performed by Dr. Gross on November 21, 2014.

In a report dated November 19, 2015, Dr. Gross provided a history and results on examination. He diagnosed right knee osteoarthritis.

Appellant again submitted a request for an increased schedule award on February 1, 2016. By letter dated February 5, 2016, OWCP advised appellant that he must submit probative medical evidence with respect to further permanent impairment of the right lower extremity.

By decision dated March 29, 2016, OWCP denied appellant's claim for an additional schedule award as there was no medical evidence of record supporting an increased permanent impairment.

On April 16, 2016 appellant, through his then representative, requested reconsideration. Appellant submitted a South Carolina Workers' Compensation Commission form medical report from Dr. Gross dated April 6, 2016. Dr. Gross opined that appellant had 37 percent permanent impairment of the right knee pursuant to the A.M.A., *Guides*. Appellant's representative argued that the medical evidence of record showed an increased schedule award based on recent surgeries to the right knee.

By decision dated May 16, 2016, OWCP denied appellant's request for reconsideration of the merits of the claim. It found that although the medical evidence submitted with the April 16, 2016 reconsideration request was new, it was irrelevant or immaterial to the underlying issue of permanent impairment of the right leg.

### **LEGAL PRECEDENT -- ISSUE 1**

5 U.S.C. § 8107 provides that, if there is permanent disability involving the loss or loss of use of a member or function of the body, the claimant is entitled to a schedule award for the permanent impairment of the scheduled member or function.<sup>3</sup> Neither FECA nor the regulations

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<sup>3</sup> 5 U.S.C. § 8107. This section enumerates specific members or functions of the body for which a schedule award is payable and the maximum number of weeks of compensation to be paid; additional members of the body are found at 20 C.F.R. § 10.404(a).

specify the manner in which the percentage of impairment for a schedule award shall be determined. For consistent results and to ensure equal justice for all claimants OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.<sup>4</sup> For schedule awards after May 1, 2009, the impairment is evaluated under the sixth edition.<sup>5</sup>

An employee seeking compensation for a permanent impairment under FECA has the burden of proof to establish the essential elements of the claim, including that an employment injury contributed to a permanent impairment of a scheduled member or function of the body.<sup>6</sup> The medical evidence necessary to support a schedule award includes a physician's detailed report that provides a sufficient description of the impairment.<sup>7</sup>

### **ANALYSIS -- ISSUE 1**

OWCP accepted right medial meniscus tear, closed fracture of right clavicle, and right knee osteoarthritis due to appellant's February 6, 1993 fall in the performance of duty. The issue before the Board is whether appellant has more than 63 percent permanent impairment of the right lower extremity.<sup>8</sup>

As noted above, it is appellant who has the burden of proof to establish permanent impairment. Prior to the March 29, 2016 merit decision, appellant submitted no new medical evidence on the issue of increased impairment. The last report from Dr. Gross, dated November 19, 2015, did not discuss permanent impairment.

On appeal, appellant notes that he has undergone several surgeries to his right knee, and he could not understand how the surgeries and knee complications did not warrant an additional schedule award. The issue, however, must be decided by the probative medical evidence of record. There is no probative medical evidence of record with respect to employment-related permanent impairment greater than the 63 percent previously awarded. The Board therefore finds that appellant failed to establish more than 63 percent permanent impairment of the right lower extremity, warranting an increased schedule award.

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<sup>4</sup> A. George Lampo, 45 ECAB 441 (1994).

<sup>5</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5a (February 2013); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

<sup>6</sup> *See A.B.*, Docket No. 12-1392 (issued January 24, 2013).

<sup>7</sup> *See James E. Jenkins*, 39 ECAB 860 (1988); Federal (FECA) Procedure Manual, Part 2 *supra* note 5 at Chapter 2.808.5 (February 2013).

<sup>8</sup> On June 21, 1996 appellant received an award of 37 percent permanent impairment; on November 27, 1997 he received an additional 13 percent permanent impairment; and on January 7, 2011 he received an additional 13 percent for a total of 63 percent.

## **LEGAL PRECEDENT -- ISSUE 2**

To require OWCP to reopen a case for merit review under section 8128(a) of FECA,<sup>9</sup> OWCP's regulations provides that a claimant may obtain review of the merits of the claim by submitting a written application for reconsideration that sets forth arguments and contains evidence that either: "(i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP."<sup>10</sup> 20 C.F.R. § 10.608(b) states that any application for review that does not meet at least one of the requirements listed in 20 C.F.R. § 10.606(b)(3) will be denied by OWCP without review of the merits of the claim.<sup>11</sup>

## **ANALYSIS -- ISSUE 2**

In the present case, appellant requested reconsideration and submitted a form report from Dr. Gross dated April 6, 2016. The Board finds that appellant did not show that OWCP erroneously applied or interpreted a specific point of law. Moreover, appellant did not advance a relevant legal argument not previously considered.

The underlying issue on reconsideration was whether appellant had more than 63 percent permanent impairment of the right lower extremity, for which he previously received a schedule award, thereby warranting an increased or additional schedule award. Appellant failed to provide any relevant or pertinent new evidence to substantiate an increased schedule award.

Dr. Gross briefly reports that appellant had 37 percent right lower extremity permanent impairment, without providing any additional details or explanation, such as an impairment rating in accordance with the sixth edition of the A.M.A., *Guides*, and thus are irrelevant to the issue.<sup>12</sup> Evidence that does not address the particular issue involved does not warrant reopening a case for merit review.<sup>13</sup> Appellant had previously received schedule awards for 63 percent right lower extremity permanent impairment as a result of his February 6, 1993 employment injury. The Board finds that, since appellant failed to submit any relevant and pertinent new evidence with respect to an increased permanent impairment, OWCP properly considered appellant's submission as an application for reconsideration.<sup>14</sup>

To require OWCP to reopen the case for a merit review, appellant must meet one of the requirements of 20 C.F.R. § 10.606(b)(3) as noted above. The Board finds that appellant did not

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<sup>9</sup> 5 U.S.C. § 8128(a) (providing that "[t]he Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application").

<sup>10</sup> 20 C.F.R. § 10.606(b)(3).

<sup>11</sup> *Id.* at § 10.608(b); *see also* *Norman W. Hanson*, 45 ECAB 430 (1994).

<sup>12</sup> *See B.H.*, Docket No. 16-1411 (issued December 23, 2016).

<sup>13</sup> *Id.*; *see also* *Freddie Mosley*, 54 ECAB 255 (2002).

<sup>14</sup> *See J.M.*, Docket No. 15-1634 (issued September 16, 2016); *R.M.*, Docket No. 14-0490 (issued December 17, 2014).

show that OWCP erroneously applied or interpreted a specific point of law, or advance a relevant legal argument not previously considered by OWCP. As noted above, appellant did not submit relevant and pertinent new evidence not previously considered by OWCP. Appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3), and therefore OWCP properly denied the application for reconsideration.

Appellant may request, at any time, a schedule award or increased schedule award based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

### **CONCLUSION**

The Board finds that appellant had not established more than 63 percent right lower extremity permanent impairment. The Board further finds that OWCP properly denied appellant's request for reconsideration of the merits of his claim pursuant to 5 U.S.C. § 8128(a).

### **ORDER**

**IT IS HEREBY ORDERED THAT** the decisions of the Office of Workers' Compensation Programs dated May 16 and March 29, 2016 are affirmed.

Issued: March 10, 2017  
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board